Supreme Court, U. S.
FILED
DEC 30 1980
MICHAEL RODAK, JR., CLERK

80-1098

No.

IN THE

Supreme Court of the United States

October Term, 1980.

ORANGE COUNTY, NEW YORK,
Petitioner,

v.

THE UNITED STATES DEPARTMENT OF LABOR,
Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

JAMES G. SWEENEY
Attorney for Petitioner
255-275 Main Street
Goshen, N. Y. 10924
(914) 294-5151, Ext. 185

December 29, 1980

No. _____.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980.

- -X

ORANGE COUNTY, NEW YORK,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

- -X

PETITION FOR A WRIT OF CERTIORARI.

The petitioner, County of Orange, New York respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit

entered in this proceeding on October 3, 1980.

QUESTIONS PRESENTED.

1. Whether 29 C.F.R. 98:22 is invalid and is unconstitutional because it violates the Fifth Amendment of the United States Constitution?

2. Whether the County of Orange has standing to maintain this action on behalf of persons residing in the County of Orange?

TABLE OF CONTENTS.

	Page
Questions Presented	ii
Table of Contents	iii
Table of Authorities	iv
Opinion Below	1
Jurisdiction	1
Statement of the Case	1
Reasons for Granting the Writ . .	4
Conclusion	15
Appendix A--Opinion of United States Court of Appeals for the Second Circuit . .	16
Appendix B--Decision of Administrative Law Judge . . .	19

TABLE OF AUTHORITIES.

CASES:

Page

Hampton v. Mow Sun Wong, 426 U. S. 33 at 41 . . 6, 7, 9, 11

Kotch v. Board of River Port Pilot Com'rs., 330 U. S. 552 (1947) 17

Schware v. Board of Examiners of New Mexico, 353 U. S. 232 (1957) 10

State of Oklahoma v. United States Civil Service Commission, 330 U. S. 127 (1947) 11

Trauz v. Rauch, 239 U. S. 33 at 41 5

STATUTES:

	Page
29 C.F.R. Part 98	2
29 C.F.R. Part 98:22	4, 6, 10
28 U.S.C. §1254 (1)	1
29 U.S.C. §801	1
29 U.S.C. §825(g)	13, 14

OTHER AUTHORITIES:

Professor Lawrence Tribe's work, "American Constitutional Law," 1978 ed. at page 952 . 8

U. S. Constitution:

Fifth Amendment 5, 6

Fourteenth Amendment 5

OPINION BELOW.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of New York.

JURISDICTION.

The judgment of the Court of Appeals for the Second Circuit was entered on October 3, 1980. This petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE.

This proceeding was instituted by the petitioner, County of Orange, under the Comprehensive Employment and Training Act of 1973 as amended (29 U.S.C.

§801 *et seq.*) and the Comprehensive Employment Training Act (CETA) Regulations promulgated thereunder (29 C.F.R. Part 98). The Associate Regional Administrator of the Department of Labor notified the County Executive of Orange County, New York, a CETA Grantee that the County was in violation of the nepotism restrictions specified in Section 98:22 of the CETA Regulations.

The Petitioner, County of Orange, requested a hearing which was held before Robert J. Feldman, an Administrative Law Judge of the United States Department of Labor.

On September 15, 1975, Janet Allard, was hired in a Title VI public service employment position by the Probation Department of Orange County, New York a CETA grantee, that at that time her husband, Louis Allard, was the Director of

Data Processing for the County and in that capacity he managed and supervised the work of about forty people. He also supervised certain employees in his division who were CETA employees. On September 15, 1975, Mr. and Mrs. Allard were living together as husband and wife. On May 5, 1978 Mrs. Allard's employment with the County ended and she has not since been employed by the County of Orange. At the end of July 1978, Mrs. Allard left the family home and took up residence elsewhere. In September 1978 Mr. and Mrs. Allard entered into a legal separation agreement. Mr. Allard had no connection with the hiring of personnel for the Department of Probation. Furthermore Mr. Allard made no effort prior to the hiring or during the hiring of Mrs. Allard to persuade the Department of Probation to hire Mrs. Allard.

The administrative decision of Judge Feldmann confirmed that the hiring of Mrs. Allard was in violation of the nepotism restrictions specified in 29 C.F.R. Part 98:22.

Following the administrative decision, the Department of Labor has demanded that the County of Orange forward a check in the amount of $20,760.41 claimed as gross wages and fringe benefits paid to Mrs. Allard by the County of Orange. The United States Court of Appeals for the Second Circuit denied petitioner's petition for review and affirmed the decision of the Secretary of Labor.

REASONS FOR GRANTING THE WRIT.

1. The decision below has a significant and important effect on the

rights of thousands of spouses of state and county employees throughout the country to engage in a common occupation of life. The due process clauses of the Fifth and Fourteenth Amendments as interpreted by the United States Supreme Court have given a broad definition to liberties and rights of individuals afforded protection against arbitrary destruction or infringement. One such major liberty is the right to engage in any of the common occupations of life. As early as 1915, the United States Supreme Court, in *Trauz v. Rauch*, 239 U. S. 33 at 41, a case dealing with the employment opportunities of aliens in Arizona, stated:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment (Fourteenth) to secure . . . If this count be refused solely upon

> the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words."

The Supreme Court again in *Hampton v. Mow Sun Wong*, 426 U. S. 88 (1976), struck down a broad classification of a U. S. Civil Service Commission rule barring all noncitizens from employment in the federal competitive civil service. The Court observed that such a rule operated to deprive a large class of persons throughout the United States of eligibility for employment in a major sector of the economy and deprived them of an interest in liberty. The Court further found that the ban on alien employment was insufficiently justified and thus held that it violated the due process clause of the Fifth Amendment.

It is at this point that the foundation for 29 C.F.R. 98:22 breaks down.

Nepotism *per se* is not so invidious as to forever, under any circumstances, bar public or quasi public employment, cf. *Kotch v. Board of River Port Pilot Com'rs.*, 330 U. S. 552 (1947). Of anti-nepotism statutes it has been said in *Backman v. Bateman*, 263 P. 2d 561 at 563, 4:

> "* * * where the validity of a (anti-nepotism) law which would infringe upon important constitutional liberties and property rights of citizens is questioned, it is not only permissible, but our duty to look beyond the first blush impression of the enactment to see whether there is a sound basis to justify such use of the police power; that is whether there is an evil of a substantial nature affecting the public welfare at which the legislation is aimed, and whether it could reasonably be supposed to tend toward the accomplishment of that purpose. The extent to which such rights can be limited must bear some reasonable relationship to the seriousness of the evil which is sought to be corrected. As had been said of old, 'It is unwise to burn a barn to get rid of a mouse.'"

The methodology used by the court in deciding the *Mow Sun Wong* case is important.

It puts the question now before this court into better perspective. That methodology is aptly summarized in Professor Lawrence Tribe's work *"American Constitutional Law,"* 1978 ed. at page 952 wherein he concludes:

> "The mode of analysis employed by the Court in *Hampton v. Mow Sun Wong* may provide a model for future cases involving governmental infringements of personal freedom to pursue a vocation. The Court considered (1) the breadth of the infringement, (2) the character of the group upon which it was imposed, (3) the nature and responsibilities of the body that imposed it, (4) the availability of less restrictive alternatives, (5) the reasons actually canvassed in the process of adopting the challenged rule, and (6) the arguments made in defense of the rule's enforcement. Arguments not corresponding to considerations that actually led to the rule's adoption were disregarded; claims about the rule's hypothetical advantages were rejected where not supported by the record; and defenses of the rule cast in terms of interests beyond the delegated responsibilities of the body promulgating it were deemed irrelevant."

Using this type of analysis on the present rule applied to the present facts

reveals that the rule is extremely broad in its application affecting perhaps millions of CETA recipients; one imposed not by Congress or a legislative body but by the Secretary of Labor, a non elected designee of the President; one directed at an objective that could have been achieved by far less stringent rules applying to the hiring of familial individuals by people in administrative capacities having control over those whose employment is questioned.

Any "hypothetical" advantage that may be claimed as being an objective of the Section 98:22 such as a wider distribution of CETA funds may not be legitimately put forth as a basis for the rule. See *Hampton v. Mow Sun Wong, supra.* Such reasoning would be at best speculative and countered by the realization that in today's

world millions of husbands and wives and their children are in the work force and that an anti-nepotism rule as broad as this could work against, rather than in favor of, a wider distribution of CETA funds by precluding a large segment of potentially valid CETA recipients from receiving funds.

Appropriate here is Mr. Justice Black's comment on this type of overly broad vocational regulation in *Schware v. Board of Examiners of New Mexico*, 353 U. S. 232 (1957), wherein he remarked that a vocational of occupational qualification must have a "rational connection" with the applicant's fitness or capacity to do the job. On this record, there is no rational connection between the all encompassing anti-nepotism rule in 29 C.F.R. 98:22 and the ability of Mrs. Allard to do her job in the Department of Probation far

removed from any ability on her husband's part to hire or fire her or supervise her work. If it is nepotism that Sec. 98:22 seeks to cure, it is burning down the barn in this case to do it.

The County of Orange has standing to appeal the constitutionality of 29 C.F.R. 98:22. It is quite obvious that the County of Orange, as a prime sponsor, has standing to sue. Furthermore, even without specific statutory authorization for review, the County of Orange would have a justiciable cause of action. In *State of Oklahoma v. United States Civil Service Commission*, 330 U. S. 127 (1947), the Supreme Court ruled that the State of Oklahoma had the capacity to challenge the constitutionality of a provision of the Hatch Act. The Court held that where the State of Oklahoma had the legal right to

receive federal highway funds by virtue of congressional enactments, the violation of such statutory right normally creates a justiciable cause of action even without specific statutory authorization for review in determining the right of Oklahoma to challenge the constitutionality of the Hatch Act, under which United States Civil Service Commission directed suspension from office of a member of, Oklahoma Highway Commission, or in lieu thereof, that the federal highway funds be withheld from the State on its refusal to order such suspension.

There can be no question that the County of Orange has the capacity to bring this suit as a prime sponsor. It has a legitimate interest in raising constitutional issues in connection with the application of the Department of Labor regulations, which would deny its citizens the

right to employment and could result in an improper charge of $20,760.41 to its taxpayers.

The rule which the Department of Labor seeks to impose in connection with its effort to collect $20,760.41 from the County if clearly inconstitutional. This aspect has been covered fully in petitioner's original brief. By citing 29 U.S.C. 825(g), respondent has not successfully shown that Congress has concurred with CETA's regulations in this case. That section merely recites in part that the Secretary, by regulation, shall establish such standards and procedures for recipients of funds under this Act as are necessary to assure against program abuses, including nepotism. It does not, however, vest the Secretary with authority to promulgate unconstitutional regulations.

29 U.S.C. 825(g) authority clearly allows the Secretary to formulate regulations against the evil of nepotism. Nepotism, as defined in Black's Law Dictionary, is the "bestowal of patronage by public officers in appointing others to positions by reason of blood or marital relationships to the appoint authority." This is the evil the Secretary's regulations were designed to attack. There has been no nepotism whatsoever in this case. Louis Allard did not hire his wife, Janet Allard. She was not supervised by him. The County of Orange is the victim of a regulation which is overbroad and has no rational connection whatsoever with the evil it seeks to control, namely nepotism.

CONCLUSION.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

JAMES G. SWEENEY
Counsel for Petitioner
255-275 Main Street
Goshen, N. Y. 10924

DATED: December 29, 1980.

APPENDIX A--OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of October, one thousand nine hundred and eighty.

Present:

Hon. J. Edward Lumbard,
Hon. James L. Oakes,
Hon. Jon O. Newman,
Circuit Judges.

- -X

ORANGE COUNTY, NEW YORK,

Petitioner,

v.

UNITED STATED DEPARTMENT OF LABOR,

Respondent.

80-4068

- -X

Appeal from an order of the Secretary of Labor, United States Department of

Labor, holding that Orange County's hiring of Mrs. Janet Allard violated the nepotism restrictions of Section 98:22 of the Comprehensive Employment and Training Act (CETA) regulations, 29 C.F.R. Part 98.

The argument that the administrative law judge misconstrued the meaning of the word "nepotism" in the regulation and because Mr. and Mrs. Allard worked in different departments no violation occurred is unavailing. Mr. Allard was both a "member of the immediate family" and "engaged in an administrative capacity." The regulation was clearly within the power of the Secretary of Labor to adopt, 29 U.S.C. §801, Congress specifically so providing in respect to nepotism, see 29 U.S.C. §825(g). This regulation while somewhat mechanical obviously was designed to avoid problems which congress foresaw in the administration of the CETA program.

While Orange County has standing to appeal statutory questions or questions arising under the regulations under 29 U.S.C. §817, it lacks standing to appeal the constitutional rights of the CETA recipients. Even if it had standing as to those, however, there is no suspect classification so as to permit a claim under the equal protection clause and no fundamental rights of liberty or property are involved so as to give rise to due process claims.

Petition to review denied; decision of the Secretary of Labor affirmed.

HON. J. EDWARD LUMBARD
HON. JAMES L. OAKES
HON. JON O. NEWMAN
Circuit Judges

Filed Oct. 3, 1980
A. Daniel Fusaro, Clerk
United States Court of Appeals
Second Circuit

APPENDIX B--DECISION OF ADMINISTRATIVE LAW JUDGE.

U. S. DEPARTMENT OF LABOR

Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D. C. 20036

- -x

In the Matter of

ORANGE COUNTY, NEW YORK
(Employment of JANET ALLARD
As a Title VI PSE Participant).

- -x

Case No. 79-CETA-104

JANE SNELL, ESQ.
Office of the Regional Solicitor
U.S. Department of Labor
1515 Broadway
New York, New York 10036
For the Government

JOHN L. LEE, JR., ESQ.
Assistant County Attorney
County of Orange
Orange County Government Center
Goshen, New York 10924
For the County

Before: ROBERT J. FELDMAN
Administrative Law Judge

INITIAL DECISION

This is a proceeding under the Comprehensive Employment and Training Act of 1973, as amended (29 U.S.C. §801 *et seq.*) and the CETA Regulations promulgated thereunder (29 C.F.R. Part 98).

Statement of the Case

Under date of October 24, 1978, Donald J. Kulick, Associate Regional Administrator of the Department of Labor, notified the County Executive of Orange County, New York, a CETA grantee, that the County was in violation of the nepotism restrictions specified in Section 98.22 of the CETA Regulations. The notice stated that the violation was based upon the following factual allegations: That Mrs. Janet Allard was hired by the County Probation Office as a Title VI public service employment partici-

pant on September 15, 1975; that her husband, Louis Allard, was then Director of the County Data Processing Department; and that as such Director he was a person in an administrative capacity, thus rendering his wife's hiring within the proscription of the Regulation against a grantee's hiring a person if a member of her immediate family is engaged in an administrative capacity for the same grantee. Therefore, the notice stated, it was determined that there was a violation of the cited Regulation. The County was given 30-days from receipt of the letter to present any contrary or additional facts or any objections to the Associate Regional Administrator's determination, as well as to request a public hearing in accordance with Section 98.47 of the Regulations.

The above letter of Octover 24, 1978, also contained a notice of a proposed disallowance of costs associated with Mrs. Allard's employment, with an allegation of some $20,760.41 claimed as gross wages and fringe benefits.

Within the 30-day period, the County duly requested a hearing. Subsequently, Mrs. Allard also requested a hearing and the Regional Solicitor requested that she be added as a party in the above-entitled case. Though given due notice of the time and place of the hearing, Mrs. Allard did not appear thereat personally or by any representative. The only witness who testified at the hearing was Mr. Allard.

Findings of Fact

Upon the stipulations of counsel and the evidence adduced at the hearing,

I make the findings of fact set forth below.

On September 15, 1975, Mrs. Janet Allard was hired in a Title VI public service employment position by the Probation Department of Orange County, New York, a CETA grantee. At that time, her husband, Louis Allard, was the Director of Data Processing for the County. In that capacity, he managed and supervised the work of about 40 people comprised of keypunch operators, programmers, and/or systems analysts, computer specialist and others. Among others, he supervised certain employees in the Division who were CETA employees (public service employment participants).

On September 15, 1975, Mr. and Mrs. Allard were living together as husband and wife. On May 5, 1978, Mrs. Allard employment with the County was

terminated and she has not since been employed by the County. At the end of July, 1978, Mr. Allard left the family home and took up residence elsewhere. In September, 1978, Mr. and Mrs. Allard entered into a legal separation agreement.

At the time Mrs. Allard was hired as a Title VI PSE participant, the New York State Employment Service furnished staff people to Orange County for the purpose of determining CETA eligibility of some, but not all, CETA applicants.

No proof was adduced of the amount of wages paid or the value of fringe benefits accorded to Mrs. Allard during the period of her employment.

Discussion

The record contains no indication of any wrongdoing on the part of either Mrs. Allard or Mr. Allard. There is no suggestion of any favoritism being shown to her, nor of any influence being brought to bear by him or on his behalf. Unfortunately, such considerations do not appear to be material in determining whether the rule has been violated.

29 C.F.R. §98.22 provides in pertinent part as follows:

> (a) *Restriction.* No grantee, subgrantee, contractor, or employing agency may hire a person in an administrative capacity, staff position or public service employment position funded under the Act if a member of his or her immediate family is engaged in an administrative capacity for the same grantee or its subgrantees, contractors, or employing agencies . . ..
>
> (b) *Definitions.* For purposes of this section: (1) The

> term "member of the immediate family" includes: wife, husband, ...
>
> (3) The term "person in an administrative capacity" includes: Those persons who have overall administrative responsibility for a program, including ... other officials who have an influence or control over the administration of the program, such as the project director, deputy director and unit chiefs; and persons who have selection, hiring, placement or supervisory responsibilities for public service employment participants.

It thus appears that the relationship *per se* constitutes a violation. No exception is permitted for merit selection, extenuating circumstances, or dealing in good faith.

The County contends that the broad exclusion of the Regulation unfairly deprives the County and Mrs. Allard of constitutional rights in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Though it seems doubtful that enforcement of

the restriction on nepotism would result in denial of due process or of equal protection of the laws, that question is not for my determination. If seriously urged, it should be presented in the proper forum. Since these proceedings, though adjudicative in nature, are part of the entire administrative process, the constitutionality of the governing statute or regulation may not properly be questioned by those charged with administering it.

The eligibility provisions for participation in Title VI programs (CETA Regulations §99.42) do not contain any reference to nepotism restrictions. Consequently, even if it had been shown that the State Employment Service had issued a certification of Mrs. Allard's eligibility under Section 99.43, the

County's failure to comply with Section 98.22 would not be excused.

Conclusions of Law

I. At the time of the hiring of Mrs. Allard by Orange County, Mr. and Mrs. Allard were in fact and in law husband and wife.

II. At the time of such hiring, Mr. Allard was a person in an administrative capacity with Orange County within the meaning of Section 98.22(b)(3) of the CETA Regulations.

III. *Ergo*, the hiring of Mrs. Allard was in contravention of the restriction on nepotism contained in 29 C.F.R. §98.22.

Decision

In view of all of the foregoing, the determination of the Associate Regional Administrator that the hiring of Mrs. Janet Allard by Orange County,

New York, was in violation of Section 98.22 of the CETA Regulations is hereby confirmed.

ROBERT J. FELDMAN
Administrative Law Judge

Dated: February 29, 1980
Washington, D.C.

RJF/mml

SERVICE SHEET

Case Name Orange County, New York

Case No. 79-CETA-104

Title of Document Initial Decision

A copy of the above-named document was sent to the parties and their representatives by regular mail and certified on:

Mar 4 1980
Date

Gertha M. Carson
Name

CERTIFIED MAIL

Mr. Louis Heimbach
County Executive
Orange County
County Government Bldg.
Goshen, New York 10924

John J. Lee, Jr., Esq.
Assistant County Attorney
County of Orange
Orange County Government Center
Goshen, New York 10924

Jane Snell, Esq.
Office of the Regional Solicitor
U.S. Department of Labor
New York, New York 10036

Mrs. Janet Allard
28 Meadow Street
Newburgh, New York 12550

REGULAR MAIL

Donald J. Kulick
Associate Regional
Administrator/ETA
U.S. Department of Labor
1515 Broadway
New York, New York 10036

Nathaniel Baccus III, Esq.
Associate Solicitor for ETA
U.S. Department of Labor
Room N-2101
200 Constitution Avenue, N.W.
Washington, D.C. 20210